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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1350

RAYMOND MORENO,
JODY MORENO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Petitioners, Raymond Moreno and Jody Moreno, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 5, 1978.

OPINION BELOW

The Court of Appeals rendered its Memorandum affirming the conviction of Petitioners on January 5, 1978. On February 23, 1978, the court denied a Petition for Rehearing and granted the request by the Government for publication of the Memorandum Decision. A copy of the Memorandum Decision of January 5, 1978, the order denying rehearing of February 23, 1978, and the order for publication of February 23, 1978, are attached as Appendix "A", "B", and "C".

JURISDICTION

On January 5, 1978, the Court of Appeals entered judgment affirming the conviction of Petitioner Raymond Moreno for conspiracy to distribute heroin, possession of heroin with intent to distribute it, and possession of a loaded

firearm during the commission of a felony offense, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 924(c). The Court of Appeals also entered judgment affirming the conviction of Petitioner Jody Moreno for conspiracy to distribute heroin, distribution of heroin, possession of heroin with intent to distribute it, and possession of a loaded firearm during the commission of a felony offense, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 924(c).

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this court by Title 28, United States Code, section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court erroneously deny Petitioners' motions to suppress

evidence by finding that there was probable cause to arrest Petitioners and search their vehicle and house?

2. Did the trial court give disparate and disproportionate sentences to Petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be searched.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

> actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE FACTS

Towards the end of August, 1976, Joyce Murray was contacted by a confidential informant from New Orleans, Louisiana, concerning the purchase of a quantity of narcotics. Thereafter, there were a series of telephone conversations between the informant and Joyce Murray which were monitored by Agent Stein of the

New Orleans Drug Enforcement Administration Office. [R.T. Vol. 1, page 65].[1/] Agent Stein had a conversation with Special Agent Charles Jones of the San Diego Drug Enforcement Administration on August 29th or August 30, 1976, at which time Stein related to Jones the contents of the conversations he had monitored between the confidential informant in New Orleans and Joyce Murray in San Diego. [R.T. Vol. 1, page 64]. Stein told Jones that he overheard Murray tell the informant that she was going to obtain the heroin from her connection who was named "Tony", and that she was going to Mexico to arrange to have the narcotics delivered to the United States to the confidential informant and Agent

1/ "R.T." refers to the Reporter's Transcript of pre-trial and trial proceedings consisting of five volumes.

Stein. She also told the informant that her connection lived in Chula Vista. [R.T. Vol. 1, page 66]. During these conversations between Joyce Murray and the informant there was no mention made of appellant Ray Moreno. [R.T. Vol. 1, page 67].

Thereafter, on September 2, 1976, the confidential informant and Special Agent Stein, who was acting in an undercover capacity, arrived from New Orleans in San Diego, California, where they took a room at the Mission Valley Inn in San Diego, in Room 396. Agents had previously set up electronic surveillance of that room and were stationed in the adjoining room, 397. [R.T. Vol. 1, page 68].

On November 2, there were two or three telephone calls made by Agent Stein and the confidential informant to

Joyce Murray letting her know that the two were in town. [R.T. Vol. 1, page 17]. As a result of those phone calls, at approximately 10:00 p.m., on September 2, Joyce Murray and Michael Goodman came to Room 396 of the Mission Valley Inn. [R.T. Vol. 1, page 18]. Inside of the room they discussed the purchase of a kilo of heroin, there were negotiations for price, quality, etc., and there were phone calls made from the room to contacts who supposedly were to supply the contraband. At that time a source for the narcotics by the name of Mike was mentioned, and in fact he was allowed to talk directly with Agent Stein on the telephone. [R.T. Vol. 1, page 19]. At the conclusion of these negotiations, it was agreed that the next day further negotiations for the delivery of a kilo-

gram of heroin would continue. Murray and Goodman left the room at approximately 11:15 on September 2nd. [R.T. Vol. 1, page 20]. On the next day, September 3rd, after a series of phone calls, Goodman and a Mr. Dundas arrived at the room at approximately 4:00 p.m. More discussions for the purchase of heroin took place and the undercover agent showed Goodman and Dundas $35,000 in cash which was to be used for the purchase of the narcotics. [R.T. Vol. 1, page 21]. Dundas and the confidential informant left the room at 4:15 for the purpose of contacting Dundas' connection. They returned to the room at 6:50 p.m., accompanied by Van Deventer, who was introduced as the connection for the narcotics. [R.T. Vol. 1, page 23]. Van Deventer brought an ounce of heroin as a sample, and Stein

gave him $950 in marked money. [R.T. Vol. 1, pages 23-24]. Van Deventer called a number and asked the individual on the other end of the line for Ray's telephone number. [R.T. Vol. 1, page 25]. He then wrote down telephone number 465-4199 on a piece of paper and Agent Stein made note of that number. [R.T. Vol. 1, page 27]. Van Deventer told Stein that he would attempt to call the subject through the evening and Van Deventer gave Stein his telephone number and asked Stein to call him later. [R.T. Vol. 1, page 28].

Agents ran a check with the telephone company on the aforementioned number, and it came back to a residence at 12175 Highway 94 in Spring Valley. [R.T. Vol. 1, page 27]. Upon the conclusion of this meeting on September 3rd, the parties were still negotiating for a

kilo of heroin. [R.T. Vol. 1 page 28]. On the next day, September 4, 1976, Dundas arrived at Room 396 at 10:25 a.m., and met with the confidential informant and Agent Stein. At that time, Dundas said that the people supplying the heroin wanted the money fronted to them prior to the delivery of the narcotics and an impasse was reached. Dundas then left the room to make a phone call to Van Deventer. Upon his return to the room he stated that Ray wouldn't front the narcotics without the money first being fronted and wouldn't bring it to Mission Valley. [R.T. Vol. 1, page 30]. Dundas then phoned Van Deventer from the hotel room and Stein and Van Deventer discussed the funding of the money for the narcotics. They hung up with the agreement that Dundas was to call Van Deventer

back in ten minutes. After other phone calls back and forth, Stein and Van Deventer agreed that Van Deventer would front his own money to purchase a portion of the heroin, and handle the transaction himself. Van Deventer said that he would bring as large an amount of heroin as was possible and that he would again telephone Stein when he had obtained the heroin and was ready to deliver it. [R.T. Vol. 1, page 32]. Van Deventer arrived at the motel room at 12:40 p.m. and delivered a pound and a half of heroin to Stein, after which he was promptly arrested. [R.T. Vol. 1, page 35].

Following his arrest, Van Deventer agreed to cooperate with the agents and he stated that his source for heroin was Raymond Moreno. [R.T. Vol. 1, page 37].

Moreno's name was familiar to Agent Jones as he was a suspected dealer of heroin. [R.T. Vol. 1, page 37]. Van Deventer gave a rough description of where Moreno lived and stated that Moreno drove a 1976 Lincoln Continental Special Edition which was Maroon color with a vinyl silver or white top and a sun roof and personalized license plates. [R.T. Vol. 1, page 38]. Van Deventer further stated that Moreno dealt in large quantities of heroin, was always armed and dangerous, and had sold at least a million and a half dollars worth of heroin in the last year. Van Deventer agreed to make a phone call to Moreno and proceeded to dial the number 465-6419. [R.T. Vol. 1, page 39]. Van Deventer said that he spoke to Jody Moreno, Raymond's wife, and Raymond wasn't there and Van Deventer

should call back in twenty minutes. [R.T. Vol. 1, page 40]. Subsequently, at 4:00 p.m., another phone call was made and Van Deventer told the individual on the other end of the line that everything was okay, and he wanted ten more. The other individual told Van Deventer to go over to the spot in half an hour. Van Deventer told the agents that the spot was in the 3600 block of Fairway in Lemon Grove, and that Moreno and Van Deventer had previously met at that spot to exchange money for heroin. [R.T. Vol. 1, page 45]. Van Deventer stated that Moreno would drive to the location in his Continental, drive past Van Deventer's white Volkswagen, go down the street, turn around and come back if he thought everything was safe to make contact with Van Deventer.

[R.T. Vol. 1, pages 45-46]. At 4:00 subsequent to this phone call Agent Jones ordered other agents to surveil the residence in Spring Valley. There was no surveillance of that residence prior to the time that agents arrived there. [R.T. Vol. 1, page 80]. The agents who undertook the surveillance of the Spring Valley residence had to drive from Mission Valley to Spring Valley, a trip of about fifteen to twenty minutes.

Van Deventer was then placed in his own Volkswagen at the aforementioned spot and left there by himself while agents undertook a surveillance of that area. [R.T. Vol. 1, page 46]. Van Deventer started his car and left in a hurry, and was chased and stopped by the agents. Upon apprehension he said that the reason why he left the scene

was that he was scared to death that Mr. Moreno was going to kill him. [R.T. Vol. 1, page 47]. The agents then re-parked the vehicle at the same location with an agent sitting in it rather than Van Deventer. At about 5:15 p.m., a Sheriff's helicopter unit observed a Lincoln Continental with what appeared to be white or silver over red leave the driveway of the residence in Spring Valley. The agents were able to determine that the license plate read ZACRY 1. The vehicle drove directly to the aforementioned spot in Lemon Grove and the agents noticed a female driving the car and a male in the front passenger seat. The car approached the Volkswagen and both subjects looked at the Volkswagen and continued past it very slowly. [R.T. Vol. 1, page 49]. Agent Stein

was in the Volkswagen holding a newspaper over his face. [R.T. Vol. 1, page 50]. At that time Agent Jones ordered a Sheriff's unit to make a stop of the vehicle and arrest the suspects. [R.T. Vol. 1, page 95]. The Sheriff's vehicle pulled in behind the Morenos' vehicle and stopped it and the subjects inside the Lincoln were ordered out of the car and placed under arrest. [R.T. Vol. 1, page 52]. Following the arrest of the individuals, the officers observed in plain sight about ten ounces of heroin in a plastic bag on the rear seat and a weapon protruding from under the front seat. Found in Jody Moreno's purse was a loaded revolver and some of the marked money previously used for the purchase of one ounce of heroin.

Agents then obtained a federal

search warrant for the residence in Spring Valley and a search of that residence revealed additional quantities of contraband, weapons, and money. [R.T. Vol. 1, pages 55-56].

Agent Jones testified that he instructed the Sheriff's Deputies to make a "felony hot stop" of the vehicle which is a procedure used to stop a car that is suspected of having someone armed and dangerous. He did not know that there were narcotics in the vehicle, but had a hunch to that effect. He based the order to arrest entirely on the fact that everything happened exactly like Van Deventer stated it would: the phone call was placed, the order was made, the vehicle was observed to leave the residence and travel without stopping to the predesignated loca-

tion, and the people looked at the Volkswagen as if they anticipated making contact. He felt very strongly that the delivery was imminent though he had no specific information to the presence of narcotics in the vehicle or to the identity of the Morenos. [R.T. Vol. 1, pages 97, 101].

REASONS FOR GRANTING THE WRIT

I

THE ARREST OF PETITIONERS WAS WITHOUT PROBABLE CAUSE AND THEREFORE THE EVIDENCE OBTAINED WAS THE POISONED FRUIT OF THE ILLEGAL ARREST.

A. VAN DEVENTER'S STATEMENTS ARE INHERENTLY UNRELIABLE AND CANNOT BE CONSIDERED IN THE DETERMINATION OF PROBABLE CAUSE TO ARREST OR SEARCH.

The Court of Appeals upheld the reliance on Van Deventer's statements citing the case of United States v. Smith, 503 F.2d 1037 (9th Cir. 1974).

That case is distinguishable from this case.

In Smith, a customs agent saw a black male named Jackson and a black female go into Mexico at Nogales and later saw the same male come back into the United States alone. He was questioned and searched and the agent found a paper with the name "Johnny" and a Mexican Nogales phone number on it in Jackson's pocket.

The agent thought "Johnny" might be Johnny Grant a known Mexican narcotics dealer so he called the number. The person answering the phone identified himself as "Johnny" and said he could make a big narcotics deal with the agent the following day.

Later that day, two other black males were arrested with heroin at the

Nogales border. One told the agent that if the agent was seriously interested in catching someone with a lot of narcotics he should find two individuals at Tucson Airport [one of whom he accurately and specifically described as Jackson]. This individual told the agent that he had traveled to Nogales with Jackson and the black female and she carried 13 ounces of cocaine back into the United States.

Agents at the airport saw Jackson and the black female and arrested them and found cocaine on her. The court held that specific information supplied by Jackson was corroborated by the observations of the agent.

Smith is distinguishable because the information about "Johnny" was obtained from the defendant himself and

was corroborated by the agents. Thus -- this particular tidbit of information that pointed the finger of guilt at the defendant was not obtained from the informant but was gratuitously supplied by the defendant himself. In this case however, the corroboration is not supplied by the Morenos and corroborated independently by the agents. It is only Van Deventer's statements which allegedly interpret the Morenos' actions as having a guilty connotation.

The Smith case relied on the Supreme Court cases of Draper v. United States, 358 U.S. 307 (1959) and Spinelli v. United States, 393 U.S. 410 (1969). Both cases also require independent corroboration of the informant's statements and "independent investigation indicating the likelihood, apart from

the informer's information, that the suspect was in possession of contraband". [Id. at page 417].

The only "independent investigation" of Moreno was his general reputation to the agents as a narcotics dealer. Many cases have held that this generalized knowledge is insufficient.

Plazola v. United States, 291 F.2d 56 (9th Cir. 1961) is also on point. In that case, defendant was a known customs narcotics suspect. Customs agents believed that Plazola was hiring other people to smuggle narcotics across the border. The agents observed Plazola cross the border and shortly thereafter rendezvous with another vehicle. The rendezvous was consistent with the theory that Plazola was going to transfer marijuana from the other vehicle to

his vehicle. The court emphasized that the information that the customs had concerning Plazola was vague. The information did not consist of times, dates, names or specific modus operandi. Observation of a suspicious rendezvous was not sufficient corroboration of the customs information.

In United States v. Mitchell, 472 F.2d 67 (9th Cir. 1973), the defendant crossed the border late at night at Tecate, California. The defendant was known to customs officers as a prior narcotics violator. A vehicle search yielded negative results. Later a roving immigration check and search revealed: (1) defendant had picked up another passenger in a remote area, (2) there was a new object in the vehicle, a paper sack. A search of the sack

revealed heroin. The court rejected the Government's theory that the defendant's prior record coupled with the pick-up of a passenger and a paper bag in a remote area was probable cause that smuggling contraband has just occurred.

In United States v. Selby, 407 F.2d 241 (9th Cir. 1969), appellants entered the United States from Mexico. At the border, the appellants informed the customs inspectors they were entering the United States to notorize an affidavit for a Mexican tourist permit. Immediately thereafter, a second carload of persons, being narcotics suspects, crossed the border. On this information, Sheriff's officers intercepted the vehicles forty miles north of the border. The vehicles were escorted back to the port of entry where a search revealed

contraband. The Government claimed that there was probable cause to search the first vehicle since the second vehicle contained narcotics suspects, the first vehicle proceeded north, instead of obtaining the alleged notorization, and since the two vehicles traveled north together. The court held that there was no probable cause to search.

In United States v. Marjourau, 474 F.2d 766 (9th Cir. 1973) appellants entered the United States at the port of entry at San Luis, Arizona. A search of the vehicle revealed wet clothing in the trunk, and the appellants appeared very nervous. All this information was relayed to a special customs agent. The agent knew from experience that a typical modus operandi to smuggle is by wading across the Colorado River

near San Luis. This made the presence of wet clothing suspicious. The agent was also aware that a customs investigation was being conducted on one of the appellants concerning illegal smuggling. These circumstances resulted in a surveillance. The customs agents followed the vehicle to Yuma, Arizona. The vehicle stopped and one of the appellants walked across the street and returned from an unidentified vehicle carrying a brown package. The court said:

> These various steps in the journey from border to arrest take on a sinister coloration only on the theory that a crime has been committed and these are steps in its perpetration. The brown bag, the seeming impatience, the wet clothes, the erratic driving, all add up at the most to mere suspicion. And as to suspicion the case of Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4

L.Ed.2d 134 (1959), is clear: 'Arrest on mere suspicion collides violently with the basic right of liberty.'

474 F.2d at 770.

Significantly, the court stated there was mere suspicion and not probable cause despite the fact that customs officers were aware that one of the appellants was a smuggling suspect.

Taking the cases Mitchell, Selby, Plazola, and Marjourau together a broad proposition can be established: Prior knowledge that people are narcotics suspects coupled with observation of "suspicious activity" does not constitute probable cause when there is no observation of contraband or items that probably contain contraband. Similarly this prior knowledge and the observation of suspicious activity is

insufficient to corroborate the inherently untrustworthy statements of Van Deventer.

B. THE SEARCH WARRANT ISSUED FOR THE RESIDENCE AT 12175 HIGHWAY 94, SPRING VALLEY, WAS INVALID AND ANY EVIDENCE SEIZED PURSUANT THERETO SHOULD HAVE BEEN SUPPRESSED.

It is fundamental Fourth Amendment law that a warrant must set forth the facts tending to establish the grounds of the application, or probable cause for believing they exist. Aguilar v. Texas, 378 U.S. 108 (1964). If probable cause is to be established by information provided by an unnamed informant, the affidavit must clearly indicate that the informant is a reliable person and must give facts indicating the trustworthiness of the information provided by the informant. Aguilar v. Texas, supra. United States

v. Hamilton, 490 F.2d 598 (9th Cir. 1974).

All data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath. United States v. Anderson, 453 F.2d 174 (9th Cir. 1971).

Although the issuance of a search warrant may be based upon hearsay information, there must be specific facts laid out in the affidavit which would allow a magistrate to determine that the hearsay declarant is a reliable individual and his information provided is independently accurate. Only if the affidavit sets forth facts which enable the magistrate to judge for himself both the probable credibility of the informant and the reliability of his information, can a reviewing court be

satisfied that the magistrate has fulfilled his constitutional duty to render an independent determination that probable cause exists. Aguilar v. Texas, supra; Spinelli v. United States, 393 U.S. 410 (1969).

As the court in Aguilar v. Texas, supra, stated:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, (citation) the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed (citation) was credible or his information reliable. (emphasis supplied)

Aguilar v. Texas, supra, at page 144.

The high court has since referred

to this information as "Aguilar's two-pronged test." Spinelli v. United States, supra.

In Spinelli, supra, the court found that neither of Aguilar's tests were satisfied. In dealing with the question of the informant's reliability the court stated:

> Though the affiant swore that his confidant was reliable, he offered the magistrate no reason in support of his conclusion. (emphasis supplied)
>
> 393 U.S. at 416.

Ambiguous conclusionary language in an affidavit provides no basis for any inference of probable cause. Spinelli v. United States, supra.

The affidavit must state the basis for determining how the informant acquired his or her information in a reliable manner. An affidavit must con-

tain an allegation that the informant spoke with personal knowledge of the matters contained in his or her information. Aguilar v. Texas, supra.

The affidavit in this case contains information supplied by Van Deventer after his arrest for selling a pound and one half of heroin to a narcotics agent. As has been previously submitted, anything he could say with respect to the source of his heroin is fundamentally unreliable and suspect. Pulido v. United States, 425 F.2d 1391 (9th Cir. 1970).

Moreover, there is no information in the affidavit which corroborates his statements in any fashion except for the fact of the Continental being driven to the location of his vehicle and its occupants looking at the vehicle. It

has long been the law that corroboration of an unreliable informant's statements must go to actual illegal activity and not merely to unsuspicious innocent activity. United States v. Larkin, 510 F.2d 13, 15 (1974); Spinelli v. United States, supra.

Finally, probable cause would depend on the assumption that because the Morenos had brought ten ounces of heroin in their car, there was more to be found at the house. Yet although Van Deventer allegedly called Moreno at 4:00 p.m., to order more narcotics, there was no surveillance of the Spring Valley residence until some fifteen to twenty minutes later, (as long as it took the agents to drive from Mission Valley to Spring Valley). Additionally, there was no surveillance earlier in

the day to determine whether the pound and one half of heroin came from Morenos' house or some other place.

There being no evidence other than mere conjecture that additional contraband could be found in the residence, the warrant failed to establish probable cause to search.

II

DID THE TRIAL COURT GIVE DISPARATE AND DISPROPORTIONATE SENTENCES TO PETITIONERS?

On January 17, 1977, the District Court sentenced Raymond Moreno to the custody of the Attorney General for fifteen years on each of Counts One, Three, Four and Five of the Indictment, and for ten years on Count Six of the Indictment with all terms to run consecutive for a total of seventy years in prison. The court also attached

a special life parole term.

On January 17, 1977, the court sentenced Jody Moreno to the custody of the Attorney General for ten years on Counts One, Two, Three, Four, and Five of the Indictment with each ten year term to run concurrent, and for two years on Count Seven of the Indictment to run consecutive, for a total of twelve years. The court attached a special parole term of fifteen years.

In an effort to comply with the Ninth Circuit's decision in United States v. Capriola, 537 F.2d 319 (9th Cir. 1976) which requires a statement on the record explaining the disparity in sentencings of codefendants, the District Court made this statement:

> Perhaps for the benefit of the appellate court, the disparity in sentencing between these two defendants is

> as follows: It is the judgment of this court, based upon the evidence which this court heard, that she was involved with her husband in the distribution and sale of narcotics but that her primary involvement was that -- was because of the fact that she was an addict and a virtual slave to him. That's the reason. That's all.
>
> [R.T. Vol. 6, pages 539-540].

On appeal, Petitioners alleged that the statement is not sufficient under Capriola, supra, to explain the disparity between Raymond Moreno and the other codefendants, and between Jody Moreno and the other codefendants. All it explained was the reason for the disparity between the two Morenos, and not the disparity with the codefendants.

Joyce Murray, who was supposed to sell the undercover agent from New

Orleans two kilograms of heroin received seven years and a fifteen year special parole term. Michael Goodman, who was Joyce Murray's partner in the proposed two kilogram sale received eight years and a fifteen year special parole term. Duane Dundas who was Goodman and Murray's connection for the two kilograms of heroin received ten years with a lifetime parole term. Robert Van Deventer who was caught selling a pound and one half of heroin to an undercover agent, and then testified against petitioners, received five years with a lifetime parole.

The Court of Appeal answered petitioners' contentions as follows:

> The judge had ample basis in the facts as developed at trial and in the presentence report to distinguish his involvement and culpability and to impose a much greater sentence.
>
> [Court's Opinion at page 8].

After receiving and denying a Petition for Rehearing filed by Petitioners, the Court of Appeals augmented its memorandum and ordered the new augmented opinion to be published. (See Appendix "B"). The Court of Appeals held that two factors distinguish this case from Capriola, supra:

> (1) Since Ray Moreno was sentenced pursuant to 18 U.S.C. § 4205(b)(2) which vests the parole board with the discretion to determine the actual amount of time to be served, his case is distinguishable from Capriola whose sentence did not include that provision.
>
> (2) Unlike Capriola, the record in this case "forcefully discloses that Raymond Moreno was a very dangerous person and deserving of a lengthy sentence."
> (Appendix "B")

That same record which "forcefully discloses" the necessity of a lengthy sentence also effectively forecloses any early parole under 18 U.S.C. § 4205(b)(2).

18 U.S.C. § 4206 states that the following criteria should be used to determine whether petitioner should be paroled:

> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare.

It is easy to see why under these criteria the parole board would not give Petitioner an early parole under the facts of his case. Thus for the appellate court to state that since Raymond Moreno could be released at any time pursuant to 18 U.S.C. § 4205(b)(2), this factor precludes him from arguing that the judicial sentence of seventy years is disparate is form over substance. It is a distinction without a real difference under the facts of this case. Nowhere in Capriola is there support for this

distinction. Petitioner cannot judicially force the parole board to release him, whereas he can obtain judicial review of his sentence by the District Court. Therefore when the contention is made that the court abused its discretion in sentencing him disproportionately to the codefendants, it is no answer that he has no remedy since the parole board can release him tomorrow.

Finally, the fact that the record as a whole justifies the sentence is not sufficient to comply with Capriola. In that case, the dissenting opinion points out that in fact the record as a whole justified Capriola's sentence:

> Capriola and Freeze, who were tried and convicted, both received more severe sentences than did their co-defendants who pleaded guilty. As the majority points out, 'a number of individuals were originally supposed to

have been involved in the criminal activity' and the charges against some of them were dismissed; others were permitted to plead guilty or nolo contendere to fewer counts or to a lesser offense; some received probation and others sentences concurrent with the ones they were then serving. The majority concludes that there may by good and sufficient reasons for this disparity but that the record does not make those reasons readily discernible.

The evidence showed that Capriola and Freeze were among the leaders of the conspiracy. Capriola, a lawyer and a former deputy district attorney, supplied the legal knowledge, and Freeze was the contact with the airplane sales company which the conspirators took over.

Solomon, District Judge, dissenting, 537 F.2d at page 321.

In spite of these factors, the majority opinion held that the sentencing judge must "record an explanation" even "orally during the sentencing procedures".

[Id. at page 321]. If the majority felt that the evidence at trial was a sufficient record to base disparity upon, then it would not have required an additional statement at the time of sentencing. The majority must have felt that the appellant in that case deserved "the preservation of the appearance of judicial integrity and impartiality" [Id. at page 321], which could only be satisfied by an explanation at the time of sentencing, and not by looking at the evidentiary record to justify the sentence.

CONCLUSION

For the foregoing reasons, the Petitioners Raymond Moreno and Jody Moreno request that a Writ of Certiorari issue

to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: March 21, 1978

Respectfully submitted,

GOLDBERG & LINK

Frederic L. Link

FREDERIC L. LINK
Attorney for Petitioners
RAYMOND MORENO and
JODY MORENO

APPENDIX A

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY MORENO, Defendant-Appellant.	)	No. 77-1406
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND MORENO, Defendant-Appellant.	)	No. 77-1427 MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS and CHOY, Circuit Judges, and FERGUSON,* District Judge

Appellants appeal from judgments of conviction of the offenses of distributing

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

and dispensing heroin and conspiracy to commit that offense, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and unlawfully carrying a firearm during the commission of those felonies in violation of 18 U.S.C. § 924(c).

Jurisdiction of this court is established by 28 U.S.C. §§ 1291 and 1294.

After being convicted in separate jury trials Mr. Moreno was sentenced to a total of 70 years in prison with a special lifetime parole term. Mrs. Moreno was sentenced to a total of 12 years with a 15 year special parole term. Parole on each sentence was committed to the discretion of the Parole Board.

The appellants contend:

(1) A motion to suppress should have been granted because there was no probable cause to arrest the Morenos and

the search warrant for their home was invalid.

(2) The sentences are cruel and unusual.

(3) Due process was violated by the district court's impliedly increased punishment because the defendants exercised their right to a jury trial and failed to confess guilt prior to sentencing.

I

Motion to Suppress

A. Facts.

Undercover agents had conducted many meetings in San Diego with several persons concerning the purchase of heroin. Finally a man by the name of Van Deventer contacted the agents. In the course of their discussions, Van Deventer provided the agents with the phone number of his connection "Ray." Surveillance agents who were monitoring the negotiations

traced the number to the Moreno residence.

Further meetings and telephone conversations concerning the proposed sale took place the next morning. Eventually Van Deventer arrived at the hotel room where the agents were staying, bringing with him 1-1/2 lbs. of heroin which he stated he had obtained from Mr. Moreno earlier that day. At that point, Van Deventer was arrested and agreed to cooperate.

He told the agents that his source for heroin was Raymond Moreno, and he gave a description of where Moreno lived and the kind of car he drove. Van Deventer also stated that Moreno was always armed and dangerous and that he had sold at least a million and a half dollars worth of heroin in the last year. The name of Raymond Moreno was familiar to the agents as a suspected narcotics dealer.

With Van Deventer's consent the agents monitored a phone call to Mr. Moreno in which Van Deventer ordered ten more ounces of heroin and Moreno agreed to meet him at "the spot" in half an hour. Van Deventer told the agents where "the spot" was and described the manner in which Moreno would approach him there.

Surveillance units, including a helicopter, were then dispatched to the Moreno residence. Approximately an hour later the car Van Deventer had described as Moreno's left the residence and was followed as it proceeded directly from the residence to the meeting place. A woman was driving, and a man was sitting in the front passenger seat.

Meanwhile, Van Deventer had been taken to the meeting place and agents had established surveillance. At one point Van Deventer attempted to flee but he was

stopped. He stated that he had tried to escape because he was afraid Moreno would kill him. An agent then took Van Deventer's place in his car.

The Morenos' vehicle arrived at the pre-arranged location, approached Van Deventer's car, and then drove past it very slowly, while both passengers looked at it. This action conformed with the procedure Van Deventer had previously described to the agents.

At that point, the agents stopped the Morenos' car. The driver, Mrs. Moreno, was ordered out of the car first. She told the officers that her husband had a gun. Mr. Moreno was then removed from the car and was placed under arrest.

A search of the vehicle produced the ten ounces of heroin, which was found in plain sight on the rear seat, and

a loaded revolver, which was discovered under the passenger seat where Mr. Moreno had been sitting. Another revolver and some marked money from an earlier drug transaction were found in Mrs. Moreno's purse.

A search warrant was obtained, and the Moreno residence was searched. Additional guns, large amounts of cash and approximately 13 lbs. of heroin were discovered there.

B. Probable Cause to Arrest and Search.

The district court was correct when it found probable cause for the arrest and search of the Morenos. This court has held that information provided by an arrested co-conspirator of no proven reliability may, when detailed and corroborated by observation, constitute probable cause. United States v. Smith, 503 F.2d 1037

(1974), cert. denied, 419 U.S. 1124 (1975).

In this case the statements made by Van Deventer were amply corroborated before the Morenos were arrested. The agents had monitored a call in which Moreno had agreed to meet Van Deventer to deliver heroin. The Morenos were observed to leave their residence, the location of which Van Deventer had described, and drive directly to a meeting place which Van Deventer had pinpointed for the agents. The car they drove matched the description Van Deventer had given, and their behavior upon arriving was consistent with the information which he had provided.

Furthermore, the agents had additional, independent bases for believing Van Deventer's post-arrest statements regarding Moreno. Even before his arrest, Van Deventer had referred to his source as "Ray" and had provided the phone number

which was traced to the Moreno residence. The agents also knew of Raymond Moreno as a major narcotics dealer in the San Diego area. Although such general information as to reputation is insufficient in itself to establish probable cause, it is a factor which may be considered. United States v. Harris, 403 U.S. 573, 582-3 (1971); United States v. Fluker, 543 F.2d 709, 714 (9th Cir. 1976). Cf. United States v. Larkin, 510 F.2d 13 (9th Cir. 1974) (no probable cause where unreliable informant's tip was corroborated only by completely innocuous conduct unrelated to any alleged criminal activity).

The warrantless search of the vehicle following the arrests was justified under the "moving vehicle exception."

> "Under this exception all that is required to stop and search an automobile on the highway is probable cause to believe that it contains any kind of

> contraband. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The search is justified by exigent circumstances because 'the car is movable, the occupants are alerted and the car's content may not be found again if a warrant must be obtained . . . .'" United States v. Abascal, ___F.2d___ (9th Cir. 1977) (slip opinion 3-18-77; United States v. Garcia-Rodriguez, ___F.2d___ (9th Cir. 1977) (slip opinion 8-10-77).

The agents had probable cause to believe that the ten ounces of heroin which Van Deventer had ordered would be found in the vehicle. Additionally, based on the statements of Van Deventer and Mrs. Moreno, they had probable cause to believe that Mr. Moreno had carried a weapon in the car. This information created a particularly compelling exigent circumstance justifying an immediate search. See Cady v. Dombrowski, 413 U.S. 433 (1973).

The search of Mrs. Moreno's purse

was a valid search incident to her arrest, and a warrant was therefore unnecessary. Chimel v. California, 395 U.S. 752 (1969(; United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Mehciz, 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974 (1971).

C. Search Warrant for the Residence.

The affidavit in support of the search warrant for the Moreno residence set out in detail the events which had transpired up to that point, including a description of the items seized at the time of the arrest of the Morenos, and recited the information which had been provided by Van Deventer. The facts contained in the affidavit supported the magistrate's finding of probable cause to believe that additional contraband and relevant evidence would be found at the Morenos' home.

Van Deventer's statements were reliable because they had been corroborated by the agents' own observations before the arrest of the Morenos and by the discovery of the heroin and the guns at the time of the arrest. See Spinelli v. United States, 393 U.S. 410 (1969); United States v. Banks, 539 F.2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); Quigg v. Estelle, 492 F.2d 343 (9th Cir.), cert. denied, 419 U.S. 848 (1974). The affidavit also showed that the Morenos had driven directly from their residence to the spot where the heroin was discovered in their car. Based on his experience in investigating narcotics cases, the affiant agent stated that in order for the Morenos to deliver a substantial quantity of heroin from their house at short notice, additional quantities of narcotics and relevant evidence would most likely be present at the house. This

conclusion was supported by Van Deventer's statements that Moreno dealt in large quantities of drugs. Based on these facts, there was probable cause to search the residence.

Appellants' argument that the short delay between Van Deventer's phone call and the beginning of surveillance at the residence provided an opportunity for Moreno to go elsewhere to get the ten ounces of heroin is not well taken. In considering the sufficiency of an affidavit of probable cause, only the probability of finding the described items at a particular location must be shown. Certainty is not required. United States v. Fluker, supra.

II

Cruel and Unusual Punishment

The matter of sentencing is within the discretion of the trial court and is not reviewable by an appellate court so

long as the sentence is within the bounds prescribed by statute. United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir. 1977); United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972).

In this case, the sentences were long, but well within the trial judge's discretion. The defendants were large dealers in heroin and the presence of numerous firearms made their activities more dangerous. The trial judge sentenced after obtaining pre-sentence reports, and this court cannot say that there is no justification for the sentences.

III

Due Process

The allegation that the district judge increased defendants' sentences because they demanded a jury trial and refused to confess guilt is unsupported by anything in the record. Cf. United

States v. Laca, 499 F.2d 922 (5th Cir. L974); Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

The sentence imposed on Jody Moreno was not disporportionate to the sentences given to co-defendants who pled guilty. As to the appellant Raymond Moreno, the judge had ample basis in the facts as developed at trial and in the pre-sentence report to distinguish his involvement and culpability and to impose a much greater sentence. In the absence of any specific support in the record, this court cannot infer that the motive for the higher penalty was an improper one.

The judgments of conviction are affirmed.

APPENDIX B

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY MORENO, Defendant-Appellant.	)	No. 77-1406
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND MORENO, Defendant-Appellant.	)	No. 77-1427 ORDER FOR PUBLICATION

Before: CHAMBERS and CHOY, Circuit Judges, and FERGUSON,* District Judge

The request by counsel for the government for publication of the memorandum decision is granted. The memorandum is

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

changed to a per curiam opinion with the following changes:

Page 1: Line 12, "Memorandum" changed to "Opinion"
Line 20, Words "PER CURIAM" inserted.

Page 8: Additional paragraph inserted beginning at line 12, through line 22.

Corrected pages 1 and 8 are attached.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY MORENO, Defendant-Appellant.	)	No. 77-1406
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND MORENO, Defendant-Appellant.	)	No. 77-1427 OPINION

Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS and CHOY, Circuit Judges, and FERGUSON,* District Judge

PER CURIAM:

Appellants appeal from judgments of

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

conviction of the offenses of distributing and dispensing heroin and conspiracy to commit that offense, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and unlawfully carrying a firearm during the commission of those felonies in violation of 18 U.S.C. § 924(c).

Jurisdiction of this court is established by 28 U.S.C. §§ 1291 and 1294.

After being convicted in separate jury trials Mr. Moreno was sentenced to a total of 70 years in prison with

Cir. 1974); Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

The sentence imposed on Jody Moreno was not disproportionate to the sentences given to co-defendants who pled guilty. As to the appellant Raymond Moreno, the judge had ample basis in the facts as developed at trial and in the pre-sentence report to distinguish his involvement and culpability and to impose a much greater sentence. In the absence of any specific support in the record, this court cannot infer that the motive for the higher penalty was an improper one.

Appellants' reliance on United States v. Capriola, 537 F.2d 319 (9th Cir. 1976) is misplaced. Mr. Moreno was sentenced pursuant to the parole provisions of 18 U.S.C. § 4205(b)(2) which vests the parole board with the discretion to determine the actual amount of time to be served. The

sentences in Capriola did not include that provision. Secondly, in Capriola the court found that the record was not adequately explicit to make the reasons for disparity readily discernible. Here the record forcefully discloses that Raymond Moreno was a very dangerous person and deserving of a lengthy sentence.

The judgments of conviction are affirmed.

APPENDIX C

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY MORENO, Defendant-Appellant.	)	No. 77-1406
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND MORENO, Defendant-Appellant.	)	No. 77-1427 ORDER DENYING REHEARING

Before: CHAMBERS and CHOY, Circuit Judges, and FERGUSON,* District Judge

The petition for rehearing of appellants Jody Moreno and Raymond Moreno, filed February 3, 1978, has been considered and is denied.

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.